**TENG HOWE SING**

**v.**

**KETUA POLIS DAERAH & ANOR**

HIGH COURT MALAYA, SIBU
TEE AH SING J
[CRIMINAL APPLICATION NO. 44-4-1999]
22 MAY 1999

***CRIMINAL PROCEDURE:*** *Habeas corpus - Remand repeatedly extended because of failure to obtain consent to prosecute - No explanation for delay in applying for consent - Whether unreasonable - Whether police failed to comply with procedure to obtain consent - Affidavit evidence does not state when drugs recovered sent to chemist and whether chemist report received - Whether shows mala fide - Whether writ of habeas corpus ought to be allowed*

***CRIMINAL PROCEDURE:*** *Prosecution - Consent of Public Prosecutor - Failure of investigating officer to promptly obtain consent resulting in periodic extension of remand - Whether unreasonable - Whether police failed to comply with procedure to obtain consent*

This was an application for a writ of *habeas corpus*. The applicant was arrested and charged at the Sibu Magistrate Court under s. 39B(1)(a) of the Dangerous Drugs Act 1952 ('the DDA'). However, since the consent of the Public Prosecutor to prosecute was not tendered, the applicant was remanded pursuant to the proviso to s. 39B(3) and s. 41B of the DDA. As the consent was still not obtained, remand was extended repeatedly pending the receipt of the consent to prosecute. This resulted in a delay of some two months in the prosecution of the applicant. The investigating officer, in his affidavits, did not aver why the consent was not obtained. It was in evidence that up to the date of submissions, no application had been made to obtain the consent to prosecute. The affidavit evidence also failed to inform when the drugs found at the scene of the arrest were sent to the department of chemistry and whether the investigating officer had obtained the chemist report.

**Held:**

**[1]** The investigating officer should have, as expeditiously as the circumstances of the case permit, sent the drugs recovered to the department of chemistry for analysis and final determination of its weight and contents. Up to the date of submissions, there was no affidavit evidence adduced to state when the drugs were sent to the department of chemistry for analysis. This shows *mala fide* on the part of the police.

**[2]** Since the personal liberty of the applicant had been curtailed, the investigating officer should have obtained the chemist report at the first opportunity. If he had not received the chemist report, reasons should be given as to why the chemist report was not obtained. In the instant case, there was no explanation at all as to why the chemist report was still not received. The affidavits of the investigating officer did not even indicate whether he had or had not received the chemist report. The failure of the investigating officer to aver that he had not received the chemist report shows *mala fide* on the part of the police. Further, it could be inferred that the chemist report had been obtained as there was no averment that the chemist report had not yet been received. Since the liberty of the applicant is involved, this inference ought to be made in favour of the applicant.

**[3]** The investigating officer was aware that for cases under s. 39B(1) of the DDA, consent must be obtained from the Public Prosecutor in Kuala Lumpur. The police should have obtained the consent to prosecute as soon as possible. From the second affidavit of the investigating officer, it was clear that up to that date, the police had not even applied for the consent to prosecute. Even up to the date of submission, the police had not applied for the consent to prosecute. The police also did not give a reasonable explanation as to why the consent to prosecute had not yet been obtained. The delay of two months was unreasonable as the liberty of the applicant was at stake. The police had failed to comply with the procedure to obtain the consent to prosecute.

*[Writ of habeas corpus granted; applicant to be released forthwith.]*

**Cas*e(s) referred to:***
*Ng Hong Choon v. Timbalan Menteri Hal Ehwal Dalam Negeri & Anor [1994] 3 MLJ 285* ***(refd)***
*PP v. Ilamaran [1992] 1 CLJ 492* ***(refd)***
*Sazali Mat Noh v. Timbalan Menteri Dalam Negeri & Ors [1998] 4 CLJ 460* ***(refd)***

**Legislation referred to:**
Criminal Procedure Code, ss. 117, 376(iii), 377(b)
Dangerous Drugs Act 1952, ss. 39B(1)(a), (2), (3), (4), 41B(1)(a)

**Other source(s) referred to:**
*Maxwell on the Interpretation of Statutes*, 12th edn, p 239

*For the applicant - Joseph Tang; M/s Tang & Co*
*For the respondents - Awang Armadajaya Awg Mahmud DPP*

*Reported by S Dharmendran*

**JUDGMENT**

**Tee Ah Sing J:**

This is an application by Teng Howe Sing ("the applicant") for a writ of *habeas corpus.*

The application is supported by the affidavit of the applicant affirmed on 21 April 1999.

An affidavit in reply was affirmed by ACP Samsudin bin Sulaiman on 5 May 1999.

An affidavit balas was affirmed by Mohd Zawawi bin Abdul Rahim on 5 May 1999.

An affidavit jawapan was affirmed by Chief Inspector Anthony Abell on 4 May 1999 ("Chief Inspector Anthony Abell's affidavit")

An affidavit jawapan was affirmed by Inspector Alekzandra bin Dawam on 4 May 1999 ("the first affidavit of Inspector Alekzandra").

An affidavit jawapan was affirmed by Awg Armadajaya b. Awg Mahmud, the Deputy Public Prosecutor ("the DPP"), on 4 May 1999.

An affidavit tambahan was affirmed by Awg Armadajaya b. Awg Mahmud, the DPP, on 6 May 1999.

An affidavit tambahan was affirmed by Mohd Zawawi bin Abdul Rahim on 11 May 1999.

An affidavit tambahan was affirmed by Inspector Alekzandra bin Dawam on 11 May 1999 ("the second affidavit of Inspector Alekzandra").

An affidavit balas was affirmed by ASP Kamaludin bin Kassim on 13 May 1999.

I have considered the submissions of the learned counsel for the applicant and the learned DPP for the respondents and the affidavits. I shall now give my judgment.

In *Sazali bin Mat Noh v. Timbalan Menteri Dalam Negeri & Ors* [1998] 4 CLJ 460; [1999] 1 MLJ 9 His Lordship KC Vohrah J at pp. 13 to 15 said:

> As was pointed out by the great Judge, the late Abdoolcader J. (as he then was) in *Yeap Hock Seng v. Minister for Home Affairs, Malaysia & Ors.* [1975] 2 MLJ 279 at p. 281:

> The grant of habeas corpus is as of right and not in the discretion of the court as in the case of such extraordinary legal remedies as *certiorari*, prohibition and mandamus. It is a writ of right against which no privilege of person or place can be of any avail (*R v. Pell and Off ly* 84 ER 720). The heavy musketry of the law will always be brought to bear upon any suggestion of unlawful invasion or infringement of the personal liberty of an individual in the form of habeas corpus and kindred orders where necessary to grant relief when warranted. It was aptly put in the American case of *State ex rel Evans v. Broaddus* 245 Mo 123 at p. 140 that at least in times of peace every human power must give way to the writ of habeas corpus and no prison door is stout enough to stand in its way.

...

...

The learned judge examined several cases including the English Court of Appeal decision in the English Court of Appeal, *R v. Governor of Pentonville Prison & Anor ex p Azam* [1974] AC 18 (at pp 24-29), which was affirmed by the *House of Lords sub nom Azam v. Secretary of State for the Home Department* (at pp. 58-75) and stated in respect of the Court of Appeal decision:

> The Court of Appeal unanimously held that a person is entitled to seek a writ of *habeas corpus* as of right and is not obliged to rely on the less convenient remedy of appeal or any other alternative remedy provided by statute.

Abdoolcader J. emphasized the principle laid down by Lord Denning MR and Buckley and Stephenson LJJ, to the effect that the existence of an alternative remedy however convenient, beneficial and effectual does not prevent the issue of a writ of habeas corpus and that it is open to the court notwithstanding to examine the legality of the impugned detention.

As such, I am of the view that it was proper for the applicant to file the writ of *habeas corpus* and it is open to this court to examine the legality of the remand.

I shall now set out the facts.

On 17 March 1999 at about 7.50pm the applicant and another person were arrested by a party of police led by ASP Kamaluddin b. Kassim at Jalan Kai Peng, Jalan Tuanku Osman, Sibu.

On 18 March 1999 Inspector Alekzandra bin Dawam made an application for remand under s. 117 of the Criminal Procedure Code ("the CPC") for the applicant to be remanded. The magistrate's court ordered that the applicant be remanded for 13 days until 30 March 1999.

On 30 March 1999 the applicant was charged at the Magistrate's Court Sibu for trafficking in 440 grams of ganja contrary to s. 39B(1)(a) of the Dangerous Drugs Act 1952 ("the DDA") and punishable under s. 39B(2) of the DDA. The charge was signed by Inspector Alekzandra bin Dawam and the prosecuting officer was Chief Inspector Anthony Abell.

From para. 4 of the first affidavit of Inspector Alekzandra, it is clear that on 27 March 1999 he was directed by the Senior Federal Counsel Sarawak ("the SFC") to charge the applicant under s. 39B of the DDA.

From the affidavits of the respondents, it is clear that Inspector Alekzandra bin Dawam and Chief Inspector Anthony Abell have been authorised in writing to conduct prosecution in the Magistrate's Court at Sibu under s. 377(b) of the CPC.

I am of the view that the charge preferred against the applicant which was signed by Inspector Alekzandra bin Dawam is valid and proper in law.

In Chief Inspector Anthony Abell's affidavit it is averred that on 29 March 1999 he received instruction to charge the applicant together with another person under s. 39B(1)(a) of the DDA on 30 March 1999. It is also averred that he did charge the applicant and another person on 30 March 1999 and that no plea was taken in accordance with s. 39B(4) of the DDA. The Magistrate's Court made an order that the applicant be remanded in Sibu Prison under s. 41B(1)(a) of the DDA until the consent to prosecute is issued by the public prosecutor.

In *Public Prosecutor v. Ilamaran* [1992] 1 CLJ 492; [1992] 1 MLJ 672 His Lordship Wan Yahya J (as he then was) at p. 676 correctly stated the application of ss. 39B(3), 39B(4) and 41B of the DAA as follows:

> If the amount of drug so seized and weighed warrants a charge under s. 41B to be made, the accused is brought before the court when the charge may be read and explained to him. He will not be asked to plead to the charge (see s. 39B(4)) and neither will he be formally tried for the offence with which he had been tentatively charged until the consent by the public prosecutor as required under s. 39B(3) has been obtained. In the meantime the offending drugs should, as expeditiously as the circumstances of the case permit, be delivered to the chemist for analysis and final determination of its weight and contents. Pending the chemist's report and the consent from the public prosecutor, the accused may by virtue of the proviso to sub-s. (3) of s. 39B, be remanded in custody.

> It is ostensible from the above that in any arrest made pursuant to s. 39B, all the prosecution needs to do is to produce the arrested person before the court and have the charge read out and explained to him. Once these procedures had been complied with the court must make an order to remand the accused person in accordance with the mandatory provision of s. 41B.

And at p. 677 His Lordship said:

> Unless this Federal Court case is set aside by the Supreme court, the magistrate's court is bound by the principle of stare decisis to follow the authority laid down in *PP v. Chew Siew Luan* [1982] 2 MLJ 119 and no court in Malaysia can, in purported exercise of its powers derived from s. 388 of the CPC, grant bail to any person charged with any of those offences specified in paras. (a), (b) or under the circumstances mentioned in para. (c) of sub-s(1) of s. 41B of the Dangerous Drugs Act 1952.

In the present case on 30 March 1999 the applicant was brought to the Magistrate's Court Sibu and was charged under s. 39B(1)(a) of the DDA. He was not asked to plead to the charge (see s. 39B(4) of the DDA). Since the consent of the public prosecutor to prosecute was not tendered the applicant was remanded pursuant to the proviso to subs. (3) of s. 39B and also s. 41B of the DDA. As such, I am of the view that the order for remand granted by the learned magistrate on 30 March 1999 was done in accordance with law. However, the issue is whether the subsequent periods of remand extended weekly pending the consent to prosecute of the public prosecutor were done in accordance with law.

From the affidavits it is evident that on the directive of the public prosecutor cases classified under s. 39B of the DDA must be referred to the Head of Prosecution, Attorney-General's Chambers Malaysia, Kuala Lumpur, and any decision and consent to prosecute under s. 39B(3) of the DDA can only be issued by the Head of Prosecution, Attorney-General's Chambers Malaysia in Kuala Lumpur.

It is also clear that the resident DPP in Sibu and the SFC in Kuching have not been authorised by the Public Prosecutor Malaysia to give the consent to prosecute under s. 39B(3) of the DDA as they are subject to the directive of the Public Prosecutor Malaysia.

The relevant parts of s. 376(iii) of the CPC reads as follows:

> (iii) The Public Prosecutor may appoint fit and proper persons to be Deputy Public Prosecutors who shall be under the general control and direction of the Public Prosecutor and may exercise all or any of the rights and powers vested in or exercisable by the Public Prosecutor by or under this Code or any other written law except any rights or powers expressed to be exercisable by the Public Prosecutor personally.

I am of the view that because of the words "shall be under the general control and direction of the public prosecutor" in s. 376(iii) of the CPC, the directive given by the public prosecutor that for offences under s. 39B of the DDA the consent must be given by the Head of Prosecution, Attorney-General's Chambers Malaysia, Kuala Lumpur is valid and binding on the resident DPP in Sibu and the SFC in Sarawak.

The applicant has complained that on 30 March 1999 at the application for remand his counsel reminded the police of the need to obtain consent of the public prosecutor to prosecute. On 5 April 1999 he was brought to the Magistrate's Court for further remand. His counsel applied for his discharge on the ground that the police had no authority to prosecute the case without the consent of the public prosecutor. Further, the police had ample time to obtain the consent. However, his application before the learned magistrate was dismissed and no reason was given.

In view of the complaints of the applicant made on 30 March 1999 and 5 April 1999 before the learned magistrate it was incumbent for the prosecuting officer to take a serious view of it and to request the investigating officer to obtain the consent to prosecute as soon as possible.

In para. 6 of the first affidavit of Inspector Alekzandra it is averred that "Seterusnya saya menyatakan ada beberapa aspek penyiasatan belum disempurnakan dan kertas siasatan belum dikemukakan kepada Jabatan Peguam Negara, Malaysia di Kuala Lumpur."

Inspector Alekzandra did not condescend to any particulars. He has not explained on what aspects of the investigation that could not be completed. It is only a bare assertion. In a case such as this, I am of the view that the investigating officer, Inspector Alekzandra, should have as expeditiously as the circumstances of the case permit sent the 440 grams of ganja to the Department of Chemistry, Kuching for analysis and final determination of its weight and contents. Up to the date of submission on 17 May 1999, there was no affidavit evidence adduced to state as to the actual date the 440 grams of ganja was sent to the Department of Chemistry, Kuching for analysis. This shows *mala fide* on the part of the police. There was also no evidence as to the time frame within which the government chemist would issue the chemist report at the earliest. In other words, there was no evidence adduced that from the date of receipt of the offending drugs, the government chemist would be able to furnish his report to the police at the earliest, for example, within one week, two weeks, three weeks or three months. Since there is no evidence adduced as to the time frame the chemist report would be furnished to the police, there is no criteria to enable this court to say whether a particular delay in obtaining the chemist report is reasonable or not.

There is no time limit prescribed by the proviso to subs. (3) of s. 39B of the DDA and subs. (4) of s. 39B of the DDA as to when the consent to prosecute should be tendered in the Magistrate's Court.

Maxwell on the Interpretation of Statutes, 12th edn. at p. 239 reads as follows:

> The principle applied in construing a penal Act is that if, in construing the relevant provisions, "there appears any reasonable doubt or ambiguity," it will be resolved in favour of the person who would be liable to the penalty. "If there is a reasonable interpretation which will avoid the penalty in any particular case," said Lord Esher M.R., "we must adopt that construction. If there are two reasonable constructions we must give the more lenient one. That is the settled rule for the construction of penal sections".

From the first affidavit of Inspector Alekzandra it is clear that Inspector Alekzandra is the investigating officer in this case. He was aware that for cases under s. 39B(1) of the DDA the consent must be obtained from the public prosecutor in Kuala Lumpur and that the resident DPP in Sibu and the SFC in Kuching had no power to give the consent.

From the police report lodged by ASP Kamaludin bin Kassim, the arresting officer, it is clear that the applicant and another person were seen by ASP Kamaludin bin Kassim together and one of them was seen carrying a package. And the person carrying the package threw the package. The applicant and another person were arrested and the package thrown by the person carrying it was recovered by ASP Kamaludin bin Kassim. So it is clear that the police have direct evidence against the applicant and another person.

I agree with the contention of the applicant that in a matter of such importance where the personal liberty of the applicant is curtailed, Inspector Alekzandra should obtain the chemist report at the first opportunity. He should have contacted the chemistry department, Kuching to have the chemist report available without any delay. The whole case stands or falls with the chemist report. There is no evidence adduced that Inspector Alekzandra has done this.

In the first affidavit of Inspector Alekzandra it is not averred that up to the date of affirmation on 5 May 1999 he has not received the chemist report. If he had not received the chemist report then reasons should be given why the chemist report was not available. Similarly, in the second affidavit of Inspector Alekzandra it is not averred that up to the date of affirmation on 11 May 1999 he has not yet received the chemist report. In any event, there was no explanation at all why the chemist report was still not received.

I am of the view that the failure of Inspector Alekzandra to aver that he has not received the chemist report shows *mala fide* on the part of the police. Further it could be inferred that the chemist report had been obtained when there is no averment that the chemist report had not yet been received. Since the liberty of the applicant is involved this favourable inference must be constructed in favour of the applicant.

If the chemist report had indeed been received by Inspector Alekzandra and coupled with the fact that there is direct evidence against the applicant for the alleged offence then the police should have endeavoured to obtain the consent to prosecute without any delay from the Head of Prosecution in the Attorney-General's Chambers in Kuala Lumpur.

Further in para. 9 of the first affidavit of Inspector Alekzandra it is averred that "Seterusnya saya menyatakan setakat penyiasatan yang dijalankan saya percaya bukti bagi pertuduhan dibawah s. 39B Akta Dadah Berbahaya 1952 ke atas pemohon adalah kuat dan melampaui keraguan yang munasabah."

If this averment is accepted as true, then why is the delay to obtain the consent to prosecute from the Head of Prosecution in the Attorney-General's Chambers in Kuala Lumpur. The police have not given a reasonable explanation for the delay. In my view the police should have obtained the consent to prosecute as soon as possible.

In *Ng Hong Choon v. Timbalan Menteri Hal Ehwal Dalam Negeri & Anor* [1994] 3 MLJ 285 His Lordship Wan Yahya SCJ (delivering the judgment of the Federal Court) at p. 294 said:

> Laws which deprive the subjects of their rights to personal liberty are subject to strict construction in the same way as penal laws - see *Nagin Singh v. Jagannath* AIR 1944 Lah 422. It is a recognized principle of interpretation that laws which encroach on the rights of the subject should be construed in conjunction with laws which guarantee the subjects' fundamental rights to freedom - in our instant case, art. 5 of the Federal Constitution - and whenever possible, to be so construed as to afford respect and recognition of such right - *Walsh v. Sec of State for India* [1863] 10 HLC 367 in particular at p. 386 per Lord Westbury LC. The power under the restrictive laws can only be exercised in accordance with the procedure laid down by the law - *State of UP v. Lalai Singh Vadav* 1977 CLR (SC) 121; and in the event of any failure to conform to such procedure, the court may construe it in favour of the subjects' liberty. See *Tan Hoon Seng v. Minister for Home Affairs, Malaysia & anor* [1990] 1 MLJ 171. The need to conform strictly to procedure has been expressed by Lee Hun Hoe CJ (Borneo) in *Re Datuk James Wong Kim Min*

[1976] 2 MLJ 245 in the following term (at p. 251):

> In a matter so fundamental and important as the liberty of the subject, strict compliance with statutory requirements must be observed in depriving a person of his liberty. The material provisions of the law authorizing detention without trial must be strictly construed and safeguards which the law deliberately provides for the protection of any citizen must be liberally interpreted. Where the detention cannot be held to be in accordance with the procedure established by the law, the detention is bad and the person detained is entitled to be released forthwith.

The principle in interpreting laws which limited or reduced the liberty of the subject is that such laws were to be read strictly and any ambiguity is to be resolved in favour of the subject.

From the second affidavit of Inspector Alekzandra affirmed on 11 May 1999, it is clear that up to that date the police have not even applied for the consent to prosecute from the Head of Prosecution in the Attorney-General's Chambers in Kuala Lumpur. Even up to the date of submission on 17 May 1999 the police have not applied for the consent to prosecute from the Head of Prosecution in the Attorney-General's Chambers in Kuala Lumpur. So, I find that the police has not given a reasonable explanation as to why the consent to prosecute has not yet been obtained from the Head of Prosecution in the Attorney-General's Chambers in Kuala Lumpur from 17 March 1999 up to 17 May 1999 as the liberty of the applicant is at stake.

The delay of two months is unreasonable as the liberty of the applicant is at stake. The police has failed to comply with the procedure to obtain the consent to prosecute.

In *Public Prosecutor v. Ilamaran* [1992] 1 CLJ 492; [1992] 1 MLJ 672 His Lordship Wan Yahya J. (as he then was) at p. 677 remarked:

> I am not entirely oblivious to the disquieting prospect of an accused person being detained for an unlimited period under the proviso to s. 39B(3) and sub-s (4) but in such an event the legal remedies will lie elsewhere for a wrongful detention and not under s. 388 of the CPC.

Taking the cue from His Lordship Wan Yahya J. (as he then was), I have no hestitation in granting the writ of *habeas corpus*. I therefore make an order that the applicant is to be released forthwith.